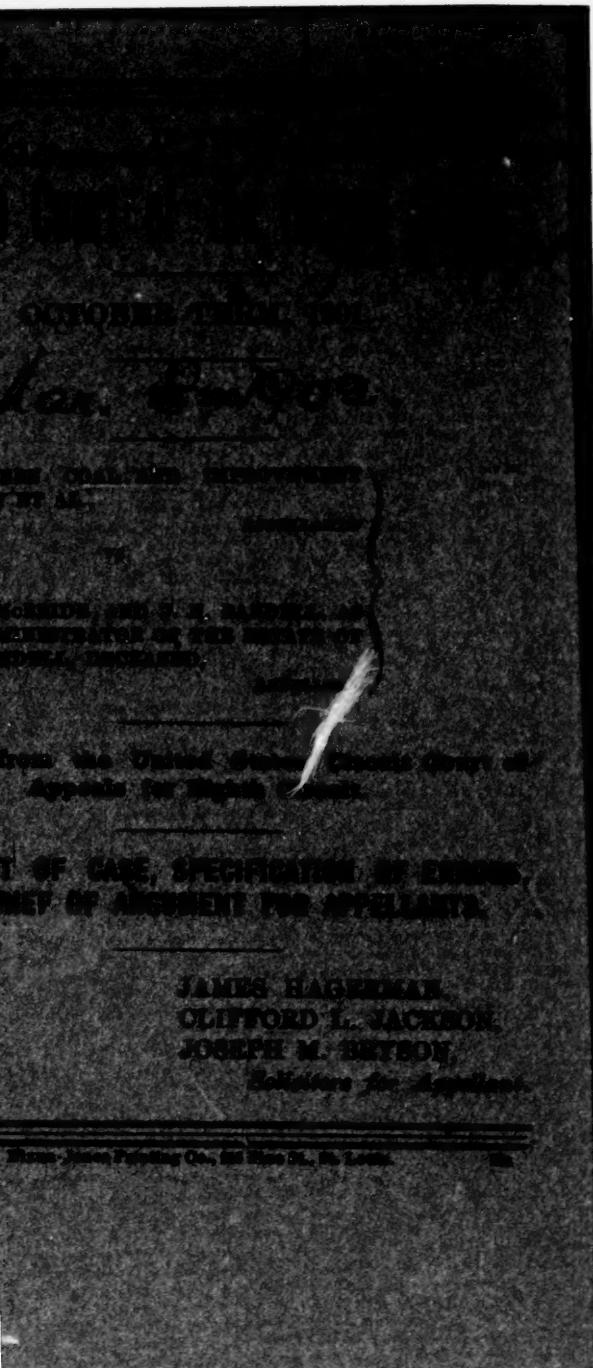

OCTOBER TERM, 1941.

No. 224.

from the United States Circuit Court of Appeals for Eighth Circuit.

T OF CASE, SPECIFICATION OF ERRORS, EF OF ARGUMENT FOR APPELLANTS.

JAMES HAGERMAN,
CLIFFORD L. JACKSON,
JOSEPH M. BETSON,
Solicitors for Appellants.

Hunter-Jones Printing Co., 310 Pine St., St. Louis.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No 230.

SOUTHWESTERN COAL AND IMPROVEMENT COMPANY ET AL.,
APPELLANTS,
vs.
HYRAM Y. McBRIDE AND J. H. RANDELL, AS THE ADMINISTRATOR OF THE ESTATE OF G. G. RANDELL, DECEASED,
APPELLEES.

Appealed from the United States Circuit Court of Appeals for Eighth Circuit.

STATEMENT OF CASE, SPECIFICATION OF ERRORS, AND BRIEF OF ARGUMENT FOR APPELLANTS.

STATEMENT.

This cause was instituted by complaint in equity filed in the office of the Clerk of the United States Court at Atoka in the Central District of the Indian Territory on the 14th day of May, 1898. Hyram Y. McBride, one of the appellees here, was the

plaintiff below, and The National Bank of Denison, The Southwestern Coal and Improvement Company, and J. H. Randell, as the administrator of the estate of G. G. Randell, deceased, were the defendants. The complaint, and the exhibits thereto, are found on pages two to six of the printed record, and for cause of action it alleges substantially as follows: —

That on April 6th, 1894, the appellee McBride was indebted to the said National Bank of Denison in the sum of five thousand dollars evidenced by a promissory note due six months after date, signed by Walter Colbert as surety and indorsed by G. G. Randell, deceased, of whose estate appellee J. H. Randell, as administrator, was one of the defendants below; and that said note was secured by mortgage on a certain interest in a coal claim in the Choctaw Nation, I. T., alleged to belong to McBride and other members and citizens of the Choctaw Nation, which coal claim was being operated as a coal mine by the appellant, and said appellee McBride was entitled to receive from appellant coal company about two hundred dollars per month in payment of the royalties on his interest so mortgaged by him. He further alleges that at the time of the filing of his bill the said royalties had long since discharged this indebtedness of five thousand dollars and interest, and that there remained unpaid by the coal company as royalty on his said interest $2,000 or more, and that fraud had been practiced upon him by G. G. Randell, deceased, and said National Bank of Denison by a

pretended sale of said mortgaged interest in said coal claim by said Randell to said bank, and that because of said conflicting claims of these various parties said coal company since February, 1897, withheld these royalties and said McBride asked for an accounting against all parties to the bill (Printed Record, pp. 2–6).

On November 11th, 1898, the appellant filed a general demurrer to this complaint (Printed Record, p. 7).

On March 17th, 1899, appellee J. H. Randell, as administrator, filed his separate demurrer, and also an answer denying the allegations of the bill (see Printed Record, pp. 7 to 10).

On March 23d, 1899, the demurrer filed by the appellant was overruled by the trial court (Printed Record, 11), whereupon the appellant and the said National Bank of Denison filed their separate answers, the separate answer of the appellant admitting knowledge of the alleged indebtedness of appellee McBride to the National Bank of Denison, and of the alleged mortgage, and further admitting that the royalties arising on said interest in said coal claims, and paid by the appellant to the bank upon request of appellee McBride, amounted to five thousand three hundred twenty-one dollars and eighty cents ($5,321.80), but denying any knowledge or information as to the alleged conspiracy in and about said mortgage and the transactions between the bank and Randell. The appellant further states in its answer that since March 1st, 1897, it has withheld payment of all royalties claimed to have accrued on

said mortgaged interest, because in said month of March, 1897, it first learned of the difference between the appellee McBride and the appellant's co-defendants below. Appellant then stated in detail the amount of the royalties for each month on said interest from March, 1897, to and including June 28, 1898, amounting to $2,617.29, which would have accrued according to the terms of the lease of McBride's coal claims by the coal company but alleged that on the said 28th day of June, 1898, the President of the United States approved an Act of the Congress of the United States entitled "An Act for the protection of the people of the Indian Territory, and for other purposes;" declaring all such royalty contracts void and that by the terms of section sixteen of which it was made unlawful for any person, after the passage of the Act, to claim, demand or receive for his own use, or the use of anyone else, any royalty on coal or any rents on any lands or property belonging to any one of the tribes of Indians in the Indian Territory, or for anyone to pay any individual any such royalty or rents, or any consideration therefor; that under this statute any royalties accrued to any person upon this said interest is no longer due and payable to the appellee McBride or any person claiming under him, and cannot be claimed, demanded, or received by the appellee McBride, or any other person, or paid by appellant to any such person because of said statute and the penalty provided for its violation (Printed Record, p. 13.)

The separate answer of the National Bank of Denison alleges that it has no interest in the subject-

matter of the suit and disclaims any interest in the money in the hands of the appellant claimed in the suit by the appellee McBride and the administrator of G. G. Randell, deceased (Printed Record, p. 15).

On the same date there was filed in open court a stipulation signed by Hyram Y. McBride, plaintiff below, and J. H. Randell, as administrator, one of the defendants below, setting forth that they were desirous of compromising and settling the case, that the defendant National Bank of Denison had answered disclaiming any interest in the subject-matter of the suit, that the appellant had answered that it had in its hand the sum of $2,617.29, in view of which they agreed in this stipulation that appellee McBride should take of the said sum of $2,617.29 the sum of $900.00, that the said appellee Randell take the residue, each of such sums to be in full of the demands of the respective parties (Printed Record, p. 16).

And on the same day and in open court the appellee McBride, and the said J. H. Randell, as administrator, filed a motion for a joint judgment or decree, upon the pleadings and under the stipulation filed in this cause, against the Southwestern Coal and Improvement Company in the sum of $2,617.29 (Printed Record, pp. 16–17).

This motion was by the trial court allowed and thereupon a final decree was rendered decreeing that the said Hyram Y. McBride and J. H. Randell as administrator should recover of the Southwestern Coal and Improvement Company the said sum of $2,617.29, allowing thirty days from the date of the

decree for the amount to be paid to the clerk of the trial court and ordering the clerk to distribute the same in accordance with the stipulation filed and above referred to (Printed Record, pp. 17–18).

Thereafter, the appellant, The Southwestern Coal and Improvement Company, within the time required by law, filed its application for an appeal from this judgment of the trial court, and perfected such appeal from said trial court to the United States Court of Appeals for Indian Territory (Printed Record, pp. 18–21).

Thereafter, and on January 2d, 1900, this decree was affirmed by the United States Court of Appeals for the Indian Territory, and a further decree rendered by the last named court against the Southwestern Coal and Improvement Company and also against Clarence W. Turner and Homer B. Spaulding, as sureties on its appeal bond, in the sum of $2,617.29, with interest at six per cent per annum from March 23d, 1899, and for the further sum of $261.72 being ten per cent thereon, and for costs (Printed Record, p. 24; 54 S. W. Rep. 1099).

Thereafter, and on the same day the appellants, The Southwestern Coal and Improvement Company, Clarence W. Turner, and Homer B. Spaulding, filed in the said Court of Appeals for the Indian Territory their petition for appeal from said United States Court of Appeals for the Indian Territory to the United States Circuit Court of Appeals for the Eighth Circuit, and filed therewith their assignment of errors, which said appeal was duly granted and an appeal bond filed and approved (Printed Record, pp. 25–27).

Thereafter, and on the 24th day of October, 1900, this decree was affirmed with costs by the United States Circuit Court of Appeals for the Eighth Circuit as against the Southwestern Coal and Improvement Company, Clarence W. Turner, Homer B. Spaulding and Cornelius E. Foley (Printed Record, p. 31; 104 Fed. 1007).

Thereafter, and on December 18, 1900, the appellants, The Southwestern Coal and Improvement Company, Clarence W. Turner, Homer B. Spaulding and Cornelius E. Foley, filed in said United States Circuit Court of Appeals for the Eighth Circuit their petition for appeal from the said United States Circuit Court of Appeals for the Eighth Circuit, and filed therewith their assignment of errors, which said appeal was duly granted and an appeal bond was filed and approved (Printed Record, pp. 31–36).

SPECIFICATION OF ERRORS.

I.

The trial court erred in overruling the appellant's demurrer to the complaint in this cause, and the Court of Appeals in the Indian Territory, and the United States Circuit Court of Appeals for the Eighth Circuit, respectively, erred in not correcting this error of the trial court (Assignment of Error 1, Printed Record, p. 11).

II.

The trial court erred in sustaining the motion of Hyram Y. McBride and J. H. Randell, as administrator, for judgment against The Southwestern Coal and Improvement Company, and the Court of Appeals in the Indian Territory and the United States Circuit Court of Appeals for the Eighth Circuit, respectively, erred in not correcting this error of the trial court (Assignment of Error 2, Printed Record, p. 17).

III.

The trial court erred in entering judgment and final decree against the appellants on the pleadings in this case, and the Court of Appeals in the Indian

Territory and the United States Circuit Court of Appeals for the Eighth Circuit, respectively, erred in not correcting this error of the trial court (Assignment of Error 3, Printed Record, pp. 17–18).

IV.

The United States Court of Appeals for the Indian Territory erred in rendering judgment against Clarence W. Turner and Homer B. Spaulding, and the United States Circuit Court of Appeals for the Eighth Circuit erred in not correcting this error of the Court of Appeals for the Indian Territory (Assignment of Error 4, Printed Record, p. 24).

V.

The United States Court of Appeals for the Indian Territory erred in rendering judgment and final decree against the appellants herein in a sum over and above the amounts called for in the original decree and interest thereon at the rate of six per cent per annum, said additional sum being declared to be ten per cent upon the sum of the amount called for by the original decree and interest thereon at the rate of six per cent per annum, and the United States Circuit Court of Appeals for the Eighth Circuit erred in not correcting this error of the United States Court of Appeals for the Indian Territory (Assignment of Error 5, Printed Record, p. 24).

VI.

The United States Circuit Court of Appeals for the Eighth Circuit erred in rendering judgment and final decree against Clarence W. Turner and Cornelius E. Foley (Assigment of Error 6, Printed Record, p. 31).

BRIEF OF ARGUMENT.

This case presents but one question for the consideration of this Court, and that is, whether under the provisions of Sec. 2116 R. S. U. S. and an act of Congress, approved June 28, 1898 (30 U. S. Stat. 495), and commonly known as the Curtis Act (which contains as Section 29 thereof, the Treaty between the Choctaw and Chickasaw Indians on the one hand and the United States on the other), individual Indians or those claiming under them could, subsequent to the passage of that Act, to wit, June 28, 1898, maintain any suits of any kind against any person on account of coal royalties provided for in leases made by said individual Indians with coal operators operating coal lands in the Choctaw Nation.

Sec. 2116 R. S. provides that no Indian tribe or nation can except by treaty or convention with the United States grant any lease or interest in their lands to any one.

The parts of the above mentioned Curtis Act and Treaty affecting coal leases and the questions at issue in this case are as follows: —

> "All agreements heretofore made by any person or
> "corporation with any member or members of the
> "Choctaw or Chickasaw Nations, the object of which
> "was to obtain such member or members' permission

"to operate coal or asphalt, *are hereby declared void;*
"provided, that nothing herein contained shall impair
"the rights of any holder or owner of a leasehold
"interest in any oil, coal rights, asphalt or min-
"eral which have been assented to by act of Congress,
"but all such interests shall continue unimpaired
"hereby and shall be assured by new leases from
"such trustees of coal or asphalt claims described
"therein, by application to the trustees within six
"months after the ratification of this Agree-
"ment. * * * *No royalty shall be paid except*
"into the United States Treasury as herein provided."

"It is agreed that all the coal and asphalt within
"the limits of the Choctaw and Chickasaw Nations
"shall *remain and be* the common property of the
"members of the Choctaw and Chickasaw Tribes
"(freemen excepted), so that each and every member
"shall have an equal and undivided interest in the
"whole: and no patent provided for in this Agree-
"ment shall convey any title thereto."

"All coal and asphalt mines in the two Nations
"whether now developed, or to be hereafter devel-
"oped, shall be operated and the royalties therefrom
"paid into the Treasury of the United States and shall
"be drawn therefrom under such rules and regula-
"tions as shall be prescribed by the Secretary of the
"Interior."

Section 16 and 18 of the Curtis Act also bear upon these same matters and are as follows: —

"Section 16. *That it shall be unlawful for any*
"person after the passage of this Act, except as
"hereinafter provided, to claim, demand, or receive,
"for his own use or for the use of any one else, any

"*royalty on oil, coal, asphalt or other mineral,* * * *
"*or for anyone to pay to any individual, any such*
"*royalty or rents, or any consideration therefor what-*
"*soever, and all royalties and rents hereafter payable*
"*to the tribe shall be paid under such rules and regu-*
"*lations as may be prescribed by the Secretary of the*
"*Interior, into the Treasury of the United States, to*
"*the credit of the tribe to which they belong.*"

"Section 18. That any person convicted of violat-
"ing any of the provisions of sections sixteen and
"seventeen of this act shall be deemed guilty of a
"misdemeanor and punished by a fine of not less than
"one hundred dollars, and shall stand committed until
"such fine and costs are paid (such commitment not
"to exceed one day for every two dollars of said fine
"and costs), and shall forfeit possession of any prop-
"erty in question, and each day on which such offense
"is committed or continues to exist shall be deemed a
"separate offense. And the United States District
"Attorneys in said Territory are required to see that
"the provisions of said sections are strictly enforced
"and they shall at once proceed to dispossess all per-
"sons of such excessive holdings of lands and to
"prosecute them for so unlawfully holding the same."

Section 29 reads: —

"That on and after the passage of this act the laws
"of the various tribes or nations of the Indians shall
"not be enforced at law or in equity by the courts of
"the United States in the Indian Territory."

We will not at length here discuss the question of the validity or the invalidity of these coal leases entered into with individual Choctaw Indians by coal

operators under which coal was mined in the Choctaw Nation prior to the passage of the Curtis Act. But we invite the attention of the court to the rulings of different departments of the executive branch of the Federal government on different occasions, and notably to the opinion of the Attorney-General of the United States rendered under date of October 14, 1896, and found in volume 18, page 486, of the opinions of Attorneys-General, in passing upon certain leases between the Osage Coal & Mining Company on the one hand and certain citizens of the Choctaw Nation on the other wherein he held all such leases void for the want of Congressional authority to make them.

Even though the coal leases and contracts were not void under Sec. 2116 R. S. still Congress has ample power to pass laws impairing the obligations of contracts made anywhere in the United States, and especially is this true as to contracts made in the Indian Territory, a country especially under the exclusive jurisdiction of the United States and subject to the laws of the Congress of the United States, and as to contracts to which Indian citizens are parties, who are wards of the Federal government and whose every action is subject to the control of the Federal government and the laws made by Congress, and as to contracts concerning tribal property of the Indians in which all have a common right and over which Congress has absolute authority.

That Congress can exercise such power over contracts in general is well shown in the following authorities: —

Legal Tender Cases, 12 Wallace, 457.

"Congress may pass laws impairing the obligations of contracts which shall be the supreme law of the land."

Ordranaux's Constitutional Legislation, p. 279.

"There is nothing in the Constitution which prohibits Congress from passing laws impairing the obligations of contracts."

2 Beach on Contracts, Section 1633, page 2117.

"The Federal constitution provides that no State shall pass any law impairing the obligations of contracts. * * * This prohibition, it will be noticed, is directed only against the States, and there is no other clause in the constitution laying a like inhibition upon Congress. It follows, therefore, that if Congress should pass a law, falling within the scope of its jurisdiction, and not obnoxious to any other prohibition of the constitution, the courts would be obliged to sustain it, notwithstanding its effect might be to impair the obligation of existing public or private contracts. The injustice of such an act would not be sufficient ground for adjudging it unconstitutional. And, in fact, such consequences have attended several of the acts of Congress, such as the legal tender law and the various statutes of bankruptcy, but their constitutionality has not been questioned on that ground."

Black's Constitutional Law, page 522, section 188.

"It is no answer to say that it (the right of Congress) interferes with the validity of contracts, for no provision of the constitution prohibits Congress

from doing this as it does the States, and where the question of the power of Congress arises as in the legal tender cases and in the bankruptcy cases, it does not depend on the incidental fact of its exercise upon contracts, but on the existence of the power itself."

Mitchell *v.* Clark, 110 U. S. 633.

"The Indian Tribes, especially the Five Tribes, are subject to the authority of Congress."

Cherokee Tobacco Case, 11 Wallace, 616; 78 U. S. 227.

The right of the individual Indian citizen to claim coal lands within the limits of the Choctaw Nation is based upon a provision found in the Choctaw Constitution. The provision is as follows: —

"Any citizen of this Nation who may find any mine or mines, or mineral water, shall have exclusive right and privilege to work the same so long as he may choose, within one mile in any direction from his works or improvements; provided, however, he does not interfere with the rights of the former settler."

Choctaw Statutes, 1894, page 24.

It is submitted however that this provision of the Choctaw Constitution is void by reason of Sec. 2116 of R. S. U. S., which provides that "*No purchase, grant, lease or other conveyance of lands or of any title or claim thereto from any Indian Nation or Tribe of Indians shall be of any validity in law or equity unless the same be made by treaty or conven-*

tion entered into pursuant to the Constitution," and because further the Chickasaw Nation, which has a joint interest in said coal lands, never consented to said provision of the Choctaw Constitution.

Congress had full authority to declare the contracts in question void though authorized when made. It did not undertake to do so without an agreement with the Choctaw and Chickasaw Indians, as contained in the above quoted treaty.

> "The unlimited power of Congress to deal with the Indians and their property and commercial transactions so long as they keep up their tribal organization, may be conceded."
>
> Thomas *v.* Gay, 169 U. S. 264.

In the case of the Choctaw Nation v. United States, 119 U. S., page 1, the Supreme Court said: —

> "The Choctaw Nation falls within the description in the terms of our Constitution, not of an independent State or Sovereign Nation, but of an Indian tribe. * * * These Indian Tribes are the wards of the Nation; dependent largely for their daily food; dependent for their political rights."
>
> See also U. S. *v.* Kagama, 118 U. S. 375.

In the case of the Cherokee Nation v. The Southern Railway Company, 135 U. S. 641, the Supreme Court of the United States, after review-

ing the decisions of that Court, and various treaties with the Cherokee Nation, uses this language: —

> "But neither this, nor any previous treaties, evinces any intention upon the part of the government to discharge them (the Indians) from their conditions of pupilage or dependency, and constitute them a separate, independent sovereign people, with no superior within its limits. * * * We think it too firmly and clearly established to admit of dispute, that the Indian Tribes residing within the territorial limits of the United States are subject to their authority. * * * The lands of the Cherokee Nation, like lands held by private owners within the geographical limits of the United States are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it, provided only, that they are not taken without just compensation being made to the owner."

In the case of the Choctaw Nation v. United States, 119 U. S. 1, the Supreme Court said: —

> "In reviewing the controversy between the parties presented by this record, it is important and necessary to consider and dispose of some preliminary questions. The first relates to the character of the parties, and the nature of the relation they sustain to each other. The United States is a sovereign nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its government is limited only by its own constitution, and the nation is subject to no law but the law of Nations.

> On the other hand, the Choctaw Nation falls within the description of the terms of the constitution, not of an independent State or Sovereign Nation, but of an Indian Tribe. As such it stands in a peculiar relation to the United States. It was capable under the terms of the constitution, of entering into treaty relations with the government of the United States, though, from the nature of the case, subject to the power and authority of the United States when Congress should choose or determine to exert its legislative power."

The Courts have uniformly held that Congress has supreme authority over the ordinary territories within the limits of the United States.

> "The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the constitution or are necessarily implied in its terms."

Murphy *v.* Ramsey, 114 U. S. 1.

The language above quoted is approved in the case of the late Corporation of Latter Day Saints v. the United States, 136 U. S. 1. The Corporation of Latter Day Saints was incorporated under an ordinance of the so-called State of Deseret, in 1851, which was validated by an Act of the Territorial Legislative Assembly of Utah passed about

six months later, and the Supreme Court of the United States decided that the Corporation had a legal existence under this charter and says: —

> "But it is too plain for argument, that this charter or enactment was subject to revocation and repeal by Congress whenever it should see fit to exercise its power for that purpose. Like any other act of the Territorial Legislature, it was subject to this condition."

This opinion further held that Congress had full and perfect right to repeal the charter of this corporation, and abrogate its corporate existence, and this in spite of the fact that its charter authorized it to receive, hold, buy, sell, manage and control real and personal property. It is true that this corporation was engaged in the dissemination of the doctrine of polygamy, but this question did not seem to enter into the question of the power of Congress to annul and render void the act of the Territorial Legislature, incorporating the Latter Day Saints. The power of Congress to organize Territorial governments and make laws for their inhabitants arises, not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty must exist in the national government, and can be found nowhere else.

"It is no answer to say that it (the right of Congress) interferes with the validity of contracts, for no provision of the Constitution prohibits Congress from doing this as it does the States, and where the question of the power of Congress arises, as in the legal tender cases and in the bankruptcy cases, it does not depend on the incidental fact of its exercise upon contracts, but on the existence of the power itself."

Mitchell *v.* Clark, 110 U. S. 633.

See the Salt Bounty Cases, entitled, Saginaw Salt Manufacturing Company v. The City of East Saginaw and Charles B. Deland.

"All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. Territories are but political subdivisions of the outlying dominion of the United States. They bear much the same relation to the general Government that counties do to the States, and Congress may legislate for them as States do for the respective municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local Government. It is obligatory on and binds the Territorial authorities, but Congress is supreme, and for the purposes of this department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution. In the organic Act of Dakota, there was no express reservation of power in Congress to Amend the Acts of the Territorial Legislature, but none was necessary. Such a power is an incident of sovereignty,

and continues until granted away. Congress may not only abrogate laws of Territorial Legislatures, but it may itself legislate directly for the local Government. It may make a void act of the Territorial Legislature valid, and a valid Act void. In other words, it has full and complete legislative authority of the Territories and all the departments of the Territorial Governments. It may do for the Territories what the people of the United States under the Constitution may do for the State."

First National Bank of Brunswick *v.* County of Yankton, 101 U. S. 129.

This doctrine is reiterated in the case of Farrell v. United States, decided by the United States Circuit Court of Appeals for the Eighth Circuit September 30, 1901, and found in 110 Fed. Rep. 942. The court discusses this question at great length but the following brief quotation will support the doctrine herein contended for: —

"The Constitution provides that Congress shall have the power 'to regulate commerce * * * with the Indian tribes.' Article 1, Section 8. This grant of authority includes the power to regulate intercourse with the individual members of such tribes."

The provision of the Choctaw Constitution under which a recovery is sought in this case gave the appellees an advantage over their brother Indians that Congress did not authorize, and the Curtis Act declared the contracts void and unenforceable.

> "A party has no vested rights in a rule of law which would give him an inequitable advantage over another; and such rule may therefore be repealed, and the advantage thereby taken away."
>
> 2 Story on the Constitution, page 703, Section 1957.

This land was deeded to the Indian nations for the equal benefit and advantage of their citizens and Congress never lost its right to declare void any act of the nations which rendered ineffectual this controlling provision of the grant.

The United States Court of Appeals for the Indian Territory based its opinion in the case at bar, and which is found in 54 S. W. Rep. 1099, upon the opinion of the same court in the case of the Atoka Coal and Mining Company v. Adams, 53 S. W. Rep. 539, in which the same general questions were passed upon that are involved in the case at bar. The Indian Territory Court of Appeals in the opinion in the Adams case, *supra*, after quoting sections sixteen and eighteen of the Curtis Act, and that part of the Choctaw-Chickasaw Treaty embodied in the Curtis Act, which are quoted in the brief, held that the language quoted therefrom seemed broad enough to prohibit the collection of any royalties that might otherwise have been due to individuals on the date of the approval of the Curtis Act, to wit, June 28, 1898, and this opinion supports every contention made by the appellants in this brief but the opinion goes further and holds that the Curtis Act should not be construed as retroac-

tive though Congress could pass a valid retroactive statute. This opinion of the Indian Territory Court of Appeals seems somewhat inconsistent. It is clearly right in holding that the language of the Curtis Act and the treaty embodied therein are strong enough to strike down any pretended claim that the individual Indians had to this coal royalty and strong enough to make it a crime for either the individual Indian to demand or claim such royalty as well as a crime for the coal operators to recognize such claim or demand of the individual Indian, and to provide a penalty against the individual Indian who made such a claim or demand and against the coal operator who recognized the same.

It is clearly wrong when it says that Congress did not have the power to enact this legislation. The general provisions of this Curtis act have been sustained in the exhaustive opinion by this court in the Citizenship Cases found in 174 U. S. 445.

In that case it was said: —

> "We are of opinion that the constitutionality of these acts (various acts affecting the power of the Dawes Commission in the Indian Territory and especially referring to the Curtis Act) in respect of the determination of citizenship, cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and moneys, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

It must be borne in mind that not alone were these claims of these individual Indians stricken down by an Act of Congress, but also by a solemn treaty between the United States on the one hand and these individual Indians on the other, and upon which each and every Indian was given an opportunity to express his individual opinion at the polls, and it is therefore stronger than an arbitrary Act of Congress made without the consent of these Indians.

If these individual Indians have a right to claim the royalty at issue in this case they have a right to claim succeeding royalties, for if the Curtis Act and Treaty are void as to any royalty it must be void as to all. There is no principle of law which will sustain the law as to royalty to accrue in the future and render it void as to royalty already accrued. The individual Indians can have no greater right to accrued royalty than to royalty to accrue. He claims both under one and the same contract. The parties to these contracts must be held to have had knowledge of the right and power of Congress to strike down and abrogate these contracts at any time. They were not *contracts* in the full sense of that word, but were arrangements permitted to the parties at the will of Congress — a mere license subject to be withdrawn or canceled at any time. How can the citizen's *right* to accrued royalty be a vested one any more than his *right* to royalty to accrue? Suppose millions of bushels of coal at the date of the act had been mined under the provisions of these contracts, but was still in bins at the mines, can it be claimed that as to such mined coal the rights of

the parties would be any different than to the coal in place? The mined coal was taken out on the faith of the contracts. The coal in place was discovered, mines developed, work done, machinery provided and capital invested on the faith of the contracts. What principle of law, we ask again, will fix the right of the parties to the coal mined and not to the coal in place?

The Court of Appeals for the Indian Territory rested its decision of this case solely upon its opinion in the case of Atoka Coal & Mining Co. v. Adams, 53 S. W. 539, the decision of that court in the case at bar being merely a memorandum opinion found in 54 S. W. 1099.

The United States Circuit Court of Appeals for the Eighth Circuit followed a similar course, the opinion in the case of Atoka Coal & Mining Co. v. Adams being found in 104 Fed. Rep. 471, and in the case at bar in 104 Fed. Rep. 1007.

A careful consideration of the opinion of the Court of Appeals of the Indian Territory in the Adams case shows that that court was clearly of the opinion that the language of the "Curtis Act" read literally, was "broad enough" to defeat a recovery but the court felt justified in so construing the act as not to defeat a recovery, basing its resort to such construction on the supposed intention on the part of Congress to only cancel the contracts as to future transactions and leave them intact as to past transactions. It was not decided that there was any ambiguity in the language of the act such as justified an interpretation of the act dif-

ferent from the plain meaning of the language used but it was simply held that retrospective laws being abhorrent to the principles of universal right and justice and condemned by the Federal Constitution and text-writers, the court should so construe the law, as not to prevent a recovery of accrued individual royalty.

It is hardly necessary for us to mention the fact that the clause in the Federal Constitution inhibiting *ex post facto* laws has no relation whatever to the case at bar. This is not a criminal proceeding.

The United States Circuit Court of Appeals for the Eighth Circuit, in the Adams case, which was a *friendly suit by petition of interpleader filed by the coal company*, declined to consider the extent of the power of Congress to legislate for the Indian Territory and the people therein, or to inquire whether Congress could in any case impair the obligation of contracts, but held that the "Curtis Act" did not affect individual royalties which accrued prior to the adoption of the act, and in its opinion uses the following language: —

> "While, in the absence of constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed; and, assuming the legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation. If Congress had intended to deprive lessors of the royalties due and owing to them at the date of the

act, it would have used appropriate language to express that intention, and would necessarily have made some provision for the disposition of such royalties. But it is clear from the language of the act that it does not deal with royalties already paid, or already due and owing to lessors under leases for coal already mined."

The Circuit Court of Appeals felt justified in departing from the plainly expressed will of Congress, as expressed in this act, to determine by some theory of its own the intention of Congress. That court construes this "Curtis Act" in the face of its language which it is submitted is too plain to admit of the construction given it. In the "Curtis Act," and in the Choctaw and Chickasaw Agreement as contained therein, all agreements such as the one here sued on are by the act "declared void," and it is further declared that all coal shall "remain and be" the common property of the nations, and it is made unlawful after the passage of the act "except as hereinafter provided" to claim or receive or to pay "any individual any such royalty" and "all royalty and rents hereafter payable to the tribe shall be paid to the treasury of the United States to the credit of the tribe," and then follows the sweeping provision that none of the United States courts in the Territory shall enforce any of the laws of the tribes "at law or in equity." This last provision though controlling was not noticed by the court in the Adams case. Let it be noted that the individual contracts are void. What does that signify? Does that mean

that they are valid and subsisting to a given point and will sustain an action to recover unpaid sums of money which have accrued as by their terms? Certainly not. If void they will not support an action even in piecemeal. The act does not say the contracts are canceled as of the date of its passage but they are simply declared void. Then follows the provision that the coal shall "remain and be" the common property of the Nations. Does that mean the coal covered by these contracts was to be the property of the individual citizen up to the passage of the act and of the Nation from that time forward? It is a controlling canon of statutory construction that courts are not justified in resorting to construction when the language of the act is plain and unambiguous. Nothing is left to construction. The act follows by making it a criminal offense for any one to claim or pay any individual royalty "except as hereinafter provided;" not even the Federal government may claim or receive individual royalty because the act says the individual agreements were void. The Federal government is only to receive royalties and rents payable to the tribes. The act did not give to the tribes a vested right to the royalty reserved to them in these individual contracts—neither to royalty accrued or to accrue. The contracts were struck down in toto.

These Courts of Appeals have read into the act an exception in favor of individuals not contained in or hinted at in the act but on the contrary expressly excluded.

The law of the Choctaw and Chickasaw Nations (under which the individual contracts were made) are declared unenforceable in the courts and the contracts themselves declared void.

It is elementary that a void contract will not support a recovery of the purchase price though the contract be fully performed on the other side. In such cases the courts leave the parties where it finds them. As to the unpaid sum the contract is not executed but executory. If it had been paid no recovery back could be had and *vice versa*.

(Central Trans. Co. v. Pullman, 139 U. S. 59; St. Louis Ry. Co. v. Terre Haute R. R., 145 U. S.; Railroad v. Thomas, 101 U. S. 86.) So, even though the individual contracts became void only by reason of the act of June 28, 1898, and not from some inherent vice, and only from that date forward, still there is now no contract on which a recovery can be had. So far as the unpaid royalties are concerned the contracts are executory and the operation of the act of Congress on the executory part is not *retroactive* in any sense.

The cases cited by the Indian Territory Court of Appeals have no application. The repeal of an existing statute enacted by competent and supreme legislative authority can bear no possible resemblance to an act declaring a so-called contract, not founded on any act of Congress but prohibited by an act of Congress, void. In the one case the legislature treats as it must do the repealed act as a valid act until repealed, as something having life and requiring a further act to put an end to its

existence; while in the other case the contract is declared never to have existed. The repealed act was law until repealed but a void thing never was.

The existence of these individual contracts, probably as much if not more than anything else, developed the sentiment in the tribes which resulted in the treaties with the Dawes Commission. The Indian citizens saw large areas of coal lands preempted by the favored few upon which individual royalty was collected to the detriment of the Nations at large. While the territory was deeded to them in common the citizens at large derived no profit from this great industry. It was the same grievance which led to the declaration against individual Indians fencing large tracts of grazing lands. The Indians in negotiating their treaties asserted the invalidity of these contracts and Congress not only prohibited them but declared them void and prohibited the courts from enforcing any tribal law on which they might be based.

Notwithstanding all these declarations against the validity of these contracts, notwithstanding their invalidity was the chief plank of the platform of the full-blood Indians in their conventions, notwithstanding the Attorney-General has declared they are void, and notwithstanding the solemn acts of Congress prohibiting and declaring them void and prohibiting the courts of the Indian Territory from enforcing the Indian law on which they are based, these Courts of Appeals found a way to hold them void only from and after June 28, 1898, and consequently held them valid up to that time.

If they were valid up to that time then Congress expressly impaired the obligation of the contracts. Is it not more reasonable to hold that Congress did not mean to exercise that high but undoubted power, but simply add the weight of its opinion as well as its legislative power against the validity of these contracts by declaring the contracts, what they had always been, void?

Respectfully submitted,

JAMES HAGERMAN,
CLIFFORD L. JACKSON,
JOSEPH M. BRYSON,

Solicitors for Appellants.